



**Fw: RE: REG 09 CWA CITIZEN SUIT SETTLEMENT AGREEMENT FOR  
REVIEW/COMMENTS. NORTHERN CALIFORNIA V KINDER MORGAN .  
REF. NO. DJ 90-1-24-03275**

**Laurie Kermish** to: Michael Hingerty, Michael Massey  
Cc: Marcela VonVacano

12/31/2012 02:06 PM

From: Laurie Kermish/R9/USEPA/US  
To: Michael Hingerty/R9/USEPA/US@EPA, Michael Massey/R9/USEPA/US@EPA,  
Cc: Marcela VonVacano/R9/USEPA/US@EPA

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Follow Up: Normal Priority.

2 attachments



J Harvey - DOJ 12-07-12 - Kinder Morgan.pdf ncrw v. kinder morgan - amended complaint.pdf

[REDACTED]

-----Forwarded by Laurie Kermish/R9/USEPA/US on 12/31/2012 02:05PM -----

=====  
To: "Woolner, Rhodora (ENRD)" <Rhodora.Woolner@usdoj.gov>, "Lu, Sarah (ENRD)"  
<Sarah.Lu@usdoj.gov>, "Dworkin, Karen (ENRD)" <Karen.Dworkin@usdoj.gov>,  
"Friedman, Henry (ENRD)" <Henry.Friedman@usdoj.gov>, Laurie  
Kermish/R9/USEPA/US@EPA, Marguerite Meeks/DC/USEPA/US@EPA, Sherry  
Milan/DC/USEPA/US@EPA, Marcela VonVacano/R9/USEPA/US@EPA  
From: "Harvey, Judy (ENRD)" <Judith.Harvey@usdoj.gov>  
Date: 12/31/2012 01:53PM  
Subject: RE: REG 09 CWA CITIZEN SUIT SETTLEMENT AGREEMENT FOR  
REVIEW/COMMENTS. NORTHERN CALIFORNIA V KINDER MORGAN. REF. NO. DJ  
90-1-24-03275  
=====

[REDACTED]

[REDACTED]

Thanks, and Happy New Year,  
Judy

From: Woolner, Rhodora (ENRD)  
Sent: Tuesday, December 11, 2012 3:38 PM  
To: Harvey, Judy (ENRD); Lu, Sarah (ENRD); Dworkin, Karen (ENRD); Friedman, Henry (ENRD); Kermish, Laurie; Meeks, Marguerite; Milan, Sherry; VonVacano, Marcela  
Cc: Smith, Justin (ENRD); Woolner, Rhodora (ENRD)  
Subject: REG 09 CWA CITIZEN SUIT SETTLEMENT AGREEMENT FOR REVIEW/COMMENTS.  
NORTHERN CALIFORNIA V KINDER MORGAN. REF. NO. DJ 90-1-24-03275  
Importance: High

Reviewers:

Please review the attached proposed settlement agreement. Provide comments to Judy Harvey <mailto:judith.harvey@usdoj.gov> and to Sarah Lu <mailto:sarah.lu@usdoj.gov> by COB 12/21/2012.

Thank you,  
Rhodora N. Woolner, SAS  
U.S. Department of Justice  
ENRD LPS  
Robert F. Kennedy Building  
950 Pennsylvania Ave., N.W.  
Room 2610  
Washington, DC 20530  
Phone: (202) 305-1721  
Main Phone: (202) 514-1442  
Fax: (202) 514-1432  
Email Address: [rhodora.woolner@usdoj.gov](mailto:rhodora.woolner@usdoj.gov)<<mailto:rhodora.woolner@usdoj.gov>>  
"A man's reach should exceed his grasp". Robert Browning

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----- Message from "Harvey, Judy (ENRD)" <[JHARVEY@jconmail.usdoj.gov](mailto:JHARVEY@jconmail.usdoj.gov)> on Sat, 8 Dec 2012 00:18:04 +0000 -----

To: "Lu, Sarah (ENRD)" <[SLU@jconmail.usdoj.gov](mailto:SLU@jconmail.usdoj.gov)>, "Woolner, Rhodora (ENRD)" <[RWoolner@ENRD.USDOJ.GOV](mailto:RWoolner@ENRD.USDOJ.GOV)>  
cc: "Smith, Justin (ENRD)" <[JSmith2@ENRD.USDOJ.GOV](mailto:JSmith2@ENRD.USDOJ.GOV)>  
Subject: FW: No. Calif. River Watch v. Kinder Morgan Energy Partners -<br>Settlement Agreement (draft)

[REDACTED]

[REDACTED]

From: Lisa Mador [mailto:lh28843@sbcglobal.net]  
Sent: Friday, December 07, 2012 7:14 PM  
To: Harvey, Judy (ENRD)  
Cc: Jack Silver; Julia C. Butler; John L. Smith  
Subject: No. Calif. River Watch v. Kinder Morgan Energy Partners - Settlement Agreement (draft)

Ms. Harvey, Attached please find communication from Jack Silver providing a draft Settlement Agreement in this matter for Dept. of Justice review under 33 U.S.C. Sec. 1365(c) (3).

- L. Mador

Lisa Hersom Mador

Legal Assistant

Law Office of Jack Silver

P.O. Box 5469

Santa Rosa, CA 95402-5469

Tel. 707-528-8175

Fax. 707-528-8675

lh28843@sbcglobal.net<mailto:lh28843@sbcglobal.net>





# Law Office of Jack Silver

P.O. Box 5469 Santa Rosa, California 95402  
Phone 707-528-8175 Fax 707-528-8675  
lhm28843@sbcglobal.net



*Via Electronic Mail*

December 7, 2012

Judy Harvey, Attorney  
U.S. Department of Justice  
Environment and Natural Resource Division  
Law and Policy Section  
P.O. Box 7415  
Ben Franklin Station  
Washington, DC 20044-7415

Re: *Northern California River Watch v. Kinder Morgan Energy Company, et al*  
U.S.D.C. Case No.: 3:12-cv-00821 EDL

Dear Attorney Harvey:

In compliance with 33 U.S.C. § 1365(c)(3), we enclose for review by the Department of Justice a copy of the draft Settlement Agreement in the above-captioned matter, which is being circulated among the parties to this action for final approval and signature.

Thank you for your consideration.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jack Silver".

Jack Silver

JS:lhm

Enclosure

cc: John L. Smith, Esq.  
Julia C. Butler, Esq.  
REED SMITH LLP

## DRAFT

### SETTLEMENT AGREEMENT AND RELEASE OF CLAIMS

This Settlement Agreement and Release of Claims ("Agreement") is entered into by and between Northern California River Watch, a non-profit corporation, on behalf of itself and its members ("NCRW"), on the one hand, and Kinder Morgan Energy Partners, L.P. and SFPP, L.P. (jointly referred to herein as "Kinder Morgan"), on the other hand, (collectively the "Parties") as of the last date executed below with respect to the following facts and objectives:

#### RECITALS

WHEREAS, on or about March 14, 2011, NCRW provided Kinder Morgan with a Notice of Violations and Intent To File Suit Under the Federal Resource Conservation and Recovery Act ("RCRA") alleging violations under the RCRA, 42 U.S.C. § 6901 *et seq.*, in conjunction with continuing pollution at three property sites located in Contra Costa County, a copy of which is attached to this Agreement as Exhibit A.

WHEREAS, on or about March 14, 2011, NCRW provided Kinder Morgan with a Notice of Violations and Intent to File Suit Under the Clean Water Act ("CWA") alleging violations under the CWA, 33 U.S.C. § 1251 *et seq.*, in conjunction with continuing pollution at the sites; a copy of which is attached to this Agreement as Exhibit B.

WHEREAS, in February 2012, NCRW filed its initial lawsuit against Kinder Morgan in the United States District Court, Northern District of California, entitled *Northern California River Watch v. Kinder Morgan Energy Partners, L.P., et al.*, Case No. 3:12-CV-00821 EDL, alleging CWA and RCRA violations at the three sites identified in the March 14, 2011 notice letters.

WHEREAS, on March 29, 2012, NCRW sent another Notice of Violations and Intent to File Suit Under the CWA and RCRA to Kinder Morgan notifying it of alleged violations of the CWA and RCRA at a fourth site, the Brisbane Terminal.

WHEREAS, on July 9, 2012, NCRW filed a First Amended Complaint to include alleged violations of CWA and RCRA at the Brisbane Terminal.

WHEREAS, Kinder Morgan denies any and all of NCRW's claims in its March 14, 2011 and March 29, 2012 notice letters and in the Complaint and the First Amended Complaint (collectively, the "Notices/Complaints");

WHEREAS, the Parties, through their authorized representatives and without either adjudication of NCRW's claims or admission by Kinder Morgan of any alleged violation or other wrongdoing, have chosen to resolve in full NCRW's allegations in the



Notices/Complaints through settlement and avoid the cost and uncertainties of further litigation; and,

WHEREAS, the Parties have agreed that it is in their mutual interest to enter into this agreement setting forth the terms and conditions appropriate to resolving NCRW's allegations set forth in the Notices/Complaints and that this Agreement constitutes a full and final adjudication of all claims that were, or could have been asserted against Kinder Morgan based upon the Notices/Complaints.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree as follows:

#### **AGREEMENT AND RELEASE**

**A. Intent of Agreement.** It is the intent of the Parties that the execution and delivery of this Agreement constitutes a full and complete satisfaction of all rights, claims and demands by NCRW against Kinder Morgan as are stated and that could have been stated in the Notices/Complaints.

**B. Affirmative Action by NCRW.**

1. **Notification to Governmental Agencies.** Within five (5) calendar days of full execution of this Agreement, NCRW will send a copy of this Agreement to the United States Department of Justice for the 45-day statutory review period, pursuant to 33 U.S.C. § 1365(c). The "Effective Date" of this Agreement shall be the date the United States notifies the Parties that it has completed its review of this Agreement and has no objections to it, or the date on which the 45-day statutory review period has expired, whichever occurs first.

2. **Dismissal.** Within five (5) calendar days of the Effective Date, NCRW shall file a Stipulation of Dismissal of the Action With Prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii).

**C. Affirmative Action by Kinder Morgan.** Kinder Morgan agrees to undertake the following work at the locations listed under the oversight of local and/or state agencies having primary jurisdiction over the remediation of the property:

1. **Concord Station, 1550 Solano Way, Concord, California.** Kinder Morgan shall install a groundwater monitoring well in the approximate location labeled MW-42 on the map attached to this Agreement as Exhibit C.

**2. Brisbane Terminal, 950 Tunnel Avenue, Brisbane, California.** Kinder Morgan shall file a Notice of Intent to Comply with California Industrial General Storm Water Permit within the ninety days from the Effective Date.

**D. Document Copies Confirming Completed Work.** To the extent that various documents confirming performance of the Affirmative Action by Kinder Morgan in Paragraph B above are not uploaded to GeoTracker, Kinder Morgan shall provide NCRW with copies of such documents. Such copies may be either hard copies of such documents or digital copies of such information.

**E. Payment of Fees and Costs.** Within thirty days of the Effective Date of this Agreement, Kinder Morgan shall pay the sum of Forty-Two Thousand Five Hundred Dollars (\$42,500.00) to NCRW to defray NCRW's investigative, expert, consultant and attorneys' fees and costs, and all other costs incurred as a result of investigating the activities at the Sites listed in the Notices/Complaints, serving and filing the Notices/Complaints and negotiating a resolution of the Notices/Complaints. Payment shall be made in the form of a single check payable to "Northern California River Watch" and shall constitute full and complete satisfaction of any and all claims by NCRW for attorneys' fees and costs in connection with this matter up to and including the Effective Date of this Agreement. Said check shall be mailed to Law Office of Jack Silver, P.O. Box 5469, Santa Rosa, CA 95402-5469; or, if mailed via FedEx, or UPS or other overnight service, to Law Office of Jack Silver, 100 E Street, Suite 318, Santa Rosa, CA 95404.

**F. Release of Liability.**

**1. Release.** NCRW, on its own behalf and on behalf of its members, subsidiaries, successors, assigns, directors, officers, agents, attorneys, representatives, and employees, releases Kinder Morgan Energy Partners, L.P., SFPP, L.P. and each of their officers, directors, employees, shareholders, parents, subsidiaries, and affiliates, and each of their predecessors, successors and assigns, and each of their agents, attorneys, consultants, and other representatives from, and waives any and all claims which arise or could have arisen from or pertain to the Notices/Complaints or any of the sites at issue in the Notices/Complaints, including, without limitation, all claims for injunctive relief, damages, penalties, fines, sanctions, mitigation, fees (including fees of attorneys, experts, and others), costs, expenses or any other sum incurred or claimed or which could have been claimed in the Notices/Complaints.

To the fullest extent possible, this Agreement shall act as a full and final resolution of any and all environmental claims, actions, or causes of action based on any statute or provision of common law, whether legal or equitable, and all liability arising out of, or in any



way related to, claims arising out of the operation of or discharges from the sites as set forth in the Notices/Complaints or which could have been raised in litigation involving the issues set forth in the Notices/Complaints. The Parties acknowledge and agree the releases do not apply to any action or claim by either party to enforce the terms of this Agreement.

## **2. Waiver Under Calif. Civil Code § 1542**

NCRW represents and warrants that it has been advised of the existence of Calif. Civil Code § 1542, which provides as follows:

**A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release which, if known by him or her, must have materially affected his or her settlement with the debtor.**

NCRW knowingly and voluntarily waives the provisions of Calif. Civil Code § 1542, and acknowledges and agrees that this waiver is an essential and material term of this Agreement, and that without such waiver this Agreement would not have been entered into by Kinder Morgan.

**G. Covenant Not To Sue.** NCRW agrees that neither NCRW, its officers, executive staff, or members of its governing board nor any organization under the control of NCRW, its officers, executive staff, or members of its governing board, will file any lawsuit against Kinder Morgan or any parent, subsidiary, partnership or other related entity of Kinder Morgan seeking any relief on any claim for a period of five (5) years from the Effective Date. NCRW further agrees that it will not support other lawsuits, by providing financial assistance, personnel time or other affirmative actions, against Kinder Morgan or any parent, subsidiary, partnership or other related entity of Kinder Morgan that may be proposed by other groups that or individuals who would rely upon the citizen suit provision or private enforcement provision of any statute for a period of five (5) years from the Effective Date.

**H. Confidentiality.** As further material consideration for the promises made in this Agreement, the Parties agree as follows:

1. **Confidential Information.** The following is "Confidential Information" which is personal and confidential to each of the Parties:

(a) the structure of any settlement of the Action;

(b) the content of any negotiations and circumstances regarding settlement of the Action;

(c) the original or any draft of this Agreement and the recitals, terms and conditions contained therein; and

(d) Any monetary consideration provided under this Agreement.

2. Non-Disclosure. The Parties must at all times:

(a) maintain the Confidential Information in confidence;

(b) not publicize or disclose, whether in whole or in part and by direct or indirect reference, the Confidential Information (including, but not limited to, the original or any copy of this Agreement or any portion thereof and the original or any copy of any consideration given pursuant to this Agreement or any portion thereof) to any person or entity not a party to this Agreement, other than to a Party's officers or directors or managing members, the Parties' attorneys, partners, employees, staff or consultants, or to the Permitted Disclosees' (as defined below) employees, insurance carriers, attorneys and tax advisors, or to government taxing authorities for the limited purposes of tax reporting and obtaining legal or tax advice, or as required by law or order of a court of competent jurisdiction; or to the government as may be required by 33 U.S.C. § 1365(c); and,

(c) instruct their respective attorneys, insurance carriers, tax advisors, officers, directors and employees (collectively, the "Permitted Disclosees") to maintain the Confidential Information in confidence and to not publicize or disclose the Confidential Information, whether in whole or in part and by direct or indirect reference, at all times.

Notwithstanding the foregoing, any Party may disclose the fact that the Parties have entered into the Agreement to settle the Notices/Complaints as between themselves.

**I. Successors.** This Agreement shall be binding upon and shall inure to the benefit of the Parties, and each of their successors, heirs, assigns, agents, directors, officers, partners, managers, owners, supervisors, consultants, employees, representatives, members, attorneys and insurance carriers.

**J. Admissions.** This Agreement shall not constitute, and no action taken pursuant to this Agreement shall constitute, any admission of fact, liability, causation, responsibility or fault, or proportionate share thereof, by any party with respect to any matter referred to herein. This Agreement shall not be used by any party in any administrative or judicial action or proceeding, or in any arbitration or alternative dispute resolution proceeding for any purpose, except for the purpose of establishing its terms in any action to enforce the terms of this Agreement.

**K. Authority of Representation.** The Parties represent and warrant that the person(s) executing this Agreement on their behalf is a representative duly authorized to bind each party, and is empowered to enter into this Agreement on each party's behalf.

**L. Notices.** Any notice required or permitted to be given pursuant to this Agreement shall be sent by facsimile and by first class mail, postage prepaid, as follows:

**To Kinder Morgan:**

Nancy Van Burgel, Esq.  
Assistant General Counsel  
Kinder Morgan, Inc.  
370 Van Gordon Street  
P.O. Box 281304  
Lakewood, CO 80228-8304

**With a Copy To:**

Reed Smith LLP  
101 Second Street, Suite 1800  
San Francisco, CA 94105  
Attn: John Lynn Smith, Esq.

**To NCRW:**

Northern California River Watch  
P.O. Box 817  
Sebastopol, CA 95472  
Attn: Larry Hanson



With a Copy to:

Law Office of Jack Silver  
P.O. Box 5469  
Santa Rosa, CA 95402-5469  
Attn: Jack Silver, Esq.

**M. Severability.** If any provision of this Agreement is held to be invalid or unenforceable, the remainder of this Agreement shall remain valid, enforceable and in full force and effect.

**N. Advice of Attorneys.** Each party herein has evaluated its respective position with regard to this matter through its own investigation and through its attorneys. Each party acknowledges that it enters into this Agreement upon the advice of its respective attorneys, that it has read this Agreement, discussed it with its attorneys, that the terms and conditions of this Agreement are fully understood and that it freely and voluntarily enters into this Agreement.

**O. Choice of Law.** This Agreement shall be governed by the laws of the State of California and shall be construed and interpreted in accordance therewith.

**P. Modification.** The terms of this Agreement shall not be changed, revised, or modified except by a written instrument signed by the Parties.

**Q. Construction of Agreement.** The Parties acknowledge that this Agreement is the product of informed negotiating among the Parties, and if any part of this Agreement is deemed ambiguous or in conflict, it shall be construed as if it were drafted jointed by all Parties.

**R. Entire Agreement.** The Parties warrant and agree that this Agreement constitutes the entire agreement between them concerning the subject matter hereof. Each party represents, warrants and agrees that no promise or agreement not expressed herein has been made to it; that in executing this Agreement, no party is relying on any statement or representation made by any other party, or any other party's representatives concerning the subject matter, basis or effect of this Agreement other than as set forth herein; and, that each party is relying solely on its own judgment and knowledge.

**S. Counterparts and Facsimile Signatures.** This Agreement may be executed in counterparts, each of which shall be deemed an original and all of which taken together, shall constitute a single Agreement with the same effect as if all the Parties had signed the same



signature page. Signatures of the Parties transmitted by facsimile or email shall be deemed binding.

**T. Warranty of Nonassignment.** The Parties hereto represent and warrant that they have not heretofore assigned or transferred, or purported to assign or transfer, to any person, firm or corporation whatsoever any claim, debt, liability, demand, obligation, cost, expense, action or causes of action covered by this Agreement, and each Party acknowledges and agrees that this warranty and representation is an essential and material term of this Agreement without which none of the consideration received in connection herewith would have been made or delivered. The foregoing warranty and representation shall survive the delivery of this Agreement, and each of the Parties hereto shall indemnify, defend and hold the others harmless from any claims, demands or actions which have been assigned or transferred, or purported to have been assigned or transferred, in violation of the foregoing representation and warranty.

**U. No Other Actions Filed.** Each of the Parties hereto represents that no litigation other than that set forth in this Agreement has been filed against any other Party hereto related in any manner to the Notices/Complaints, and will not be filed at any time hereafter.

**V. Attorney's Fees.** The Parties hereto agree to bear their own respective attorney's fees and costs incurred prior to the date this Agreement is fully executed. In the event of any controversy, claim or dispute following the date this Agreement is finally executed, in connection with or relating to this Agreement, or the subject matter hereof, the prevailing Party shall be entitled to recover all costs and expenses (including, but not limited to, reasonable attorney's fees) incurred by the prevailing Party in connection therewith.

**W. Factual Differences.** Each of the Parties understands and accepts the risk that the facts with respect to which this Agreement is entered into may be different from the facts now known or believed by each Party to be true. This Agreement shall remain in all respects effective and shall not be subject to termination or rescission by virtue of any such differences in fact.

**X. Remedies for Alleged Breach.** Other than dispute resolution, rescission or specific performance of the terms of this Agreement, there are no other remedies. The Parties specifically agree that there is no basis within this Agreement or within the contemplation of the Parties to support a claim for consequential damages due to any form of breach. The Parties hereby acknowledge and agree that the Federal District Court of Northern California shall retain jurisdiction over the Notices/Complaints for all purposes pertaining to execution and full performance of this Agreement. The Court's jurisdiction shall extend to resolution of any disputes arising out or connected with this Agreement.

IN WITNESS HEREOF, the Parties hereto have caused this Agreement to be duly executed.

DATED: \_\_\_\_\_

NORTHERN CALIFORNIA RIVER WATCH

By: \_\_\_\_\_

Margaret Bacigalupi  
Board President

DATED: \_\_\_\_\_

KINDER MORGAN ENERGY PARTNERS, L.P.

By Kinder Morgan G.P., Inc.,  
the General Partner

By Kinder Morgan Management, LLC,  
the Delegate of the General Partner

By: \_\_\_\_\_

Thomas A. Bannigan  
Vice President

DATED: \_\_\_\_\_

SFPP, L.P.

By Kinder Morgan Operating L.P. "D",  
Its General Partner

By Kinder Morgan G.P., Inc.  
the General Partner of Kinder Morgan  
Operating L.P. "D"

By Kinder Morgan Management, LLC,  
the Delegate of Kinder Morgan G.P., Inc.

By: \_\_\_\_\_

Thomas A. Bannigan  
Vice President